

DISTRICT OF MAINE

Docket No. 03-163-B-W

¹ This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on April 28, 2004, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff had osteoarthritis of the knees – an impairment that was “severe” but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 3, Record at 21; that his statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 4, *id.*; that he was capable of lifting and carrying up to twenty pounds, standing and walking for thirty minutes at a time for a total of one to two hours in an eight-hour workday, sitting for ninety minutes at a time for a total of eight hours in an eight-hour workday and occasionally balancing, kneeling, crawling, operating foot controls and climbing ramps and stairs; should avoid walking on uneven surfaces and was unable to climb ladders, ropes or scaffolds; and suffered from occasional mild to moderate pain whose symptoms allowed enough attentiveness and responsiveness to carry out normal work assignments within his residual functional capacity (“RFC”) satisfactorily, Finding 5, *id.*; that considering his age (50 then; 47 as of date of onset), education (bachelor’s degree) and work experience (skilled), Rules 201.21 and 202.14 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) would direct a conclusion of “not disabled,” Findings 8-11, *id.*; that although he was unable to perform the full range of light work, he was capable of making an adjustment to work existing in significant numbers in the national economy, as a result of which a finding of “not disabled” was reached within the framework of the Grid, Finding 12, *id.*; and he therefore was not under a disability at any time through the date of decision, Finding 13, *id.*² The Appeals Council declined to review the decision, *id.* at 6-8, making it the final determination of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

² The plaintiff had acquired sufficient quarters of coverage to remained insured for purposes of SSD through at least December 31, 2006. *See* Finding 1, Record at 20.

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 404.1520(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff's complaint also implicates Step 3 of the sequential evaluation process. At Step 3, a claimant has the burden of proving that his or her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. § 404.1520(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the listing for that impairment. 20 C.F.R. §§ 404.1525(d), 404.1528. To equal a listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. § 404.1526(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1526(b).

The plaintiff complains that the administrative law judge (i) should have found at Step 3 that his condition met or equaled Listing 1.02 or Listing 1.03 and, (ii) in any event, rendered a Step 5 finding unsupported by substantial evidence. *See generally* Itemized Statement of Specific Errors Pursuant to Local Rule 16.3(a)(2)(A) (“Statement of Errors”) (Docket No. 7). I find no reversible error.

I. Discussion

A. Step 3: Listings

The plaintiff asserts that his knee condition should have been found to have met or equaled Listings 1.02 and/or 1.03. *See id.* at 1-2. To meet Listing 1.02 (major dysfunction of joint(s) due to any cause), a claimant must show, *inter alia*, involvement of one major peripheral weight-bearing joint such as a knee, “resulting in inability to ambulate effectively, as defined in 1.00B2b,” while to meet Listing 1.03 (reconstructive surgery or surgical arthrodesis of a major weight-bearing joint, with inability to ambulate effectively as defined in 1.00B2b) a claimant must demonstrate that “return to effective ambulation did not occur, or is not expected to occur, within 12 months of onset.” Listings §§ 1.02-1.03. In turn, section 1.00B2b defines an “inability to ambulate effectively” as

an extreme limitation of the ability to walk; i.e., an impairment(s) that interferes very seriously with the individual’s ability to independently initiate, sustain, or complete activities. Ineffective ambulation is defined generally as having insufficient lower extremity functioning . . . to permit independent ambulation without the use of a hand-held assistive device(s) that limits the functioning of both upper extremities.

Id. § 1.00B2b(1). Section 1.00B2b further provides, in relevant part, that to be able to ambulate effectively

individuals must be capable of sustaining a reasonable walking pace over a sufficient distance to be able to carry out activities of daily living. They must have the ability to travel without companion assistance to and from a place of employment or school. Therefore, examples of ineffective ambulation include, but are not limited to, the inability to walk without the use of a walker, two crutches or two canes, the inability to walk a block at a reasonable pace on rough or uneven surfaces, the inability to use standard public transportation, the inability to carry out routine ambulatory activities, such as shopping and

banking, and the inability to climb a few steps at a reasonable pace with the use of a single hand rail. The ability to walk independently about one's home without the use of assistive devices does not, in and of itself, constitute effective ambulation.

Id. § 1.00B2b(2).

The Record reveals that after undergoing several right-knee surgeries, courses of physical therapy and other knee treatments, the plaintiff underwent a total right knee replacement in February 2001. *See, e.g.,* Record at 196, 216-17, 231. He had problems with the artificial knee, as a result of which surgery again was performed in November 2001 to replace one of its polyethylene components. *See, e.g., id.* at 48-49, 282. His knee pain and instability persisted, leading a Boston physician with whom the plaintiff consulted, Joseph C. McCarthy, M.D., to recommend in November 2002 that the knee replacement itself be replaced. *See, e.g., id.* at 49-50, 385, 387. As of his hearing date, March 5, 2003, the plaintiff had not as yet undergone the second total-right-knee-replacement surgery and was still weighing its risks and benefits. *See, e.g., id.* at 49-50.

In response to a question regarding his primary reason for not returning to work, the plaintiff replied: "Mobility. My walking is very very slow. I don't do stairs very well at all. Every afternoon I have to lay down for an hour, half hour, ice my knee, put it up in the air. It swells up." *Id.* at 52. The plaintiff testified that he must use a cane if the weather is bad or the ground uneven but that he can walk for about a quarter of a mile without his cane on level ground in dry weather. *See id.* at 47-48, 55. He also testified that, among other things, he could dress and groom himself, do light housework, mow using a riding mower, garden while seated, shop while leaning on a grocery cart for support, and drive daily to accomplish local errands, using his left foot for the brake. *See id.* at 38-40, 44, 54.

In the body of his decision, the administrative law judge stated that the plaintiff had no impairment that met a Listing and that no treating or examining physician had mentioned findings equivalent in severity to

a Listing. *See id.* at 17. Further, at hearing, he told the plaintiff’s counsel: “[T]he fact is that [the plaintiff has] severe problems on ambulation but he does walk a quarter mile without the assistance of a cane so I don’t think he’s going to meet that listing.” *Id.* at 81.³

Given the thrust of the plaintiff’s testimony as to his daily activities and ambulatory capacities, the administrative law judge’s finding that he did not meet or equal Listings requiring an “inability to ambulate effectively” was supported by substantial evidence.⁴

B. Step 5: Other Work

The plaintiff challenges the administrative law judge’s Step 5 determination on four bases, asserting that he erred in: (i) positing to the vocational expert that the plaintiff retained the capacity to crawl and kneel occasionally, (ii) failing to instruct the vocational expert to factor in side effects of narcotic pain medication (specifically impairment of concentration), (iii) improperly discounting pain complaints and failing to consider the effect of pain as a nonexertional limitation, and (iv) failing to consider the plaintiff’s inability to travel long distances in assessing whether the commissioner had met her burden of proving that the plaintiff was capable of performing jobs that exist in significant numbers in the regional economy. *See id.* at 2-3. For the reasons that follow, I find these complaints devoid of merit.

A. *Capacity To Crawl and Kneel Occasionally.* It is bedrock Social Security law that the responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that

³ At the hearing before the administrative law judge, the plaintiff’s counsel cited only Listing 1.03. *See* Record at 82.

⁴ For example, as counsel for the commissioner noted at oral argument, the plaintiff used only one cane (as opposed to two) and employed it only on certain occasions, ambulating at other times without an assistive device. At oral argument, counsel for the plaintiff argued that he should be deemed to have equaled the Listings on the basis of his combined knee and psoriatic-arthritis conditions. However, as counsel for the commissioner pointed out, a claimant’s medical findings must be “at least equal in severity and duration to the listed findings” to equal a Listing. 20 C.F.R. § 404.1526(a). Thus, as counsel for the commissioner posited, the administrative law judge’s findings regarding the plaintiff’s ability to ambulate were dispositive of any claim that his condition equaled (as well as met) the relevant Listings.

correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). “To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.” *Id.* Here, the administrative law judge made a supportable choice. As the plaintiff notes, there was evidence of record supporting a finding that he could not crawl or kneel. *See* Record at 335 (progress note dated April 23, 2001 by treating physician Gary Parker, M.D., noting plaintiff not to crawl or kneel); *see also, e.g., id.* at 299 (RFC assessment dated December 17, 2001 by Disability Determination Services (“DDS”) non-examining physician James H. Hall, M.D., finding plaintiff incapable of crawling). However, there also was evidence cutting the other way. Dr. Hall concluded that the plaintiff was capable of occasional kneeling, while a second DDS non-examining physician, Richard Chamberlin, M.D., concluded that he was capable of occasionally crawling and kneeling. *See id.* at 299 (Hall RFC assessment.), 379 (Chamberlin RFC assessment dated April 25, 2002). While the administrative law judge did not specifically discuss the plaintiff’s ability to crawl and kneel, he did state that he had chosen to give the findings of the DDS physicians considerable weight. *See id.* at 19.

I recognize that “the amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians will vary with the circumstances, including the nature of the illness and the information provided the expert.” *Rose v. Shalala*, 34 F.3d 13, 18 (1st Cir. 1994) (citations and internal quotation marks omitted). “In some cases, written reports submitted by non-testifying, non-examining physicians cannot alone constitute substantial evidence, although this is not an ironclad rule.” *Id.* (citations omitted). Here, however, inasmuch as appears, the DDS physicians both had the benefit of Dr. Parker’s notes, *see* Record at 297-304, 377-84, and Dr. Chamberlin’s RFC assessment was the more recent of the

two. The Chamberlin RFC assessment hence constitutes substantial evidence that the plaintiff could occasionally crawl, and the Chamberlin and Hall RFC assessments constitute substantial evidence that he could occasionally kneel.⁵

B. *Side Effects of Medication.* I again find no fault with the administrative law judge's handling of the issue of side effects of medication. The Record reveals that the plaintiff was prescribed a series of pain-relief medications by different treating physicians at different times, shifting medications because of efficacy and other concerns. *See, e.g., id.* at 202 (prescribed Oxycontin as of September 20, 1999), 225 (prescribed Morphine Sulfate, Tylenol as of August 10, 2000), 240 (prescribed Vioxx as of August 22, 2000), 273 (prescribed Vicodin as of January 10, 2001; had also tried Ultram in past), 305 (given Percocet as of January 5, 2002). The plaintiff testified that as of the hearing date he was taking Advil and a narcotic, Darvocet, daily for pain. *See id.* at 51. The administrative law judge queried whether he had had "any bad side effects" from those medications, whereupon he replied that he had suffered bad side effects "on the other medicines" but "[n]ot so bad" on the current ones. *Id.*

Later, in response to a question from his counsel as to whether the narcotics he took interfered at all with his concentration, he responded in the affirmative, describing them as dulling his acuity. *See id.* at 55. He testified that this did not affect his daily activities, which did not "require much mental process," but would affect his ability to work, noting that in his ongoing school-board work he had to keep a written record of everything although he should have been able to remember the material. *See id.* at 56. The

⁵ As counsel for the commissioner pointed out at oral argument, the note from Dr. Parker on which the plaintiff relies was written in April 2001, approximately nine weeks after his February 2001 total-knee-replacement surgery. *See Record* at 335. In a work-release letter authored one month later, Dr. Parker noted no crawling or kneeling restrictions. *See id.* at 333 (letter dated May 24, 2001 from Dr. Parker releasing plaintiff to work light duty part-time with certain enumerated restrictions).

plaintiff's counsel began to formulate a hypothetical question adding in side effects of medication, *see id.* at 69, prompting the administrative law judge to explain:

[T]he reason I didn't add a limitation like that [was] because I asked him in his credible testimony here whether or not he had any severe side effects from his medications and he said that he did not and I also observed his demeanor in the – in talking to him and all that sort of thing and I'm getting the impression that this is the sort of person who wouldn't – who has the residual concentration, persistence and pace [INAUDIBLE] even though [INAUDIBLE] some of these jobs even though he does have to take pain medication from time to time.

Id. at 70. In followup questions from his counsel and the administrative law judge, the plaintiff clarified that he took his pain medication four times daily and that he had taken it that day. *See id.* at 70-71. The administrative law judge observed that nonetheless the plaintiff seemed “pretty sharp.” *Id.* at 71. To the extent such things can be gleaned from a cold record, the hearing transcript does indeed bear out that the plaintiff was well-spoken, thoughtful and responsive to questions asked of him.⁶ What is more, when the subject again arose later in the hearing, the plaintiff explained that he had made a tradeoff, working his way down from stronger drugs (such as Oxycontin) that wiped out his pain altogether to his current lighter medications, on which he suffered some pain and did less. *See id.* at 72. Still, he testified, his current medication regimen “knocks the pain out enough that I can do what I want to do.” *Id.* at 72.

In view of the totality of this evidence, the administrative law judge supportably found the plaintiff “suffer[ed] from occasional mild to moderate pain whose symptoms allow enough attentiveness and

⁶ At oral argument, counsel for the plaintiff posited that the plaintiff's medication regime dulled his mental acuity more in the afternoon than in the morning, the time frame during which the administrative law judge had observed his demeanor. Nonetheless, the plaintiff testified at hearing that his medications' impact on his ability to concentrate was the same in the afternoon as in the morning. *See Record* at 70-71.

responsiveness to carry out normal work assignments within his residual functional capacity satisfactorily.”

Finding 5, *id.* at 21.⁷

C. Subjective Pain Complaints. The plaintiff posits that the administrative law judge erred in both (i) discounting his subjective pain complaints and (ii) failing to consider the effects of his pain as a nonexertional limitation. *See* Statement of Errors at 3. The administrative law judge did not neglect to consider the plaintiff’s pain as a nonexertional limitation; rather, he supportably found that although the plaintiff did experience occasional mild to moderate pain, the pain did not constitute a significant nonexertional limitation.

Per *Avery v. Secretary of Health and Human Servs.*, 797 F.2d 19 (1st Cir. 1986), an adjudicator must “be aware that symptoms, such as pain, can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder.” *Avery*, 797 F.2d at 23 (citation and internal quotation marks omitted). “Thus, before a complete evaluation of this individual’s RFC can be made, a full description of the individual’s prior work record, daily activities and any additional statements from the claimant, his or her treating physician or other third party relative to the alleged pain must be considered.” *Id.* (citation and internal quotation marks omitted). After obtaining such information

⁷ The plaintiff cites portions of the Record as corroborating his claim of impairment of concentration as a side effect of medication. *See* Statement of Errors at 2. While one cited document corroborates that Darvocet likely had a sedating effect on him, *see* Record at 397 (progress note of Mark A. Kandutsch, M.D., dated July 24, 2002), the cited materials do not as a whole undercut the substantiality of the evidence developed from the administrative law judge’s careful exploration of the subject at hearing. The plaintiff’s first two citations simply are to his own allegations. *See* Record at 151, 154. He next cites the report of DDS non-examining physician Dr. Hall, who noted that narcotics could interfere with the plaintiff’s concentration as alleged; however, it is unclear which allegations, concerning which narcotics. *See id.* at 302. He then cites a letter dated March 27, 2002 from his physician Bartholomew Clayton, M.D., opining: “In regards to patient being able to perform work-related mental activities such as understanding and memory, sustained concentration, persistent social interaction and adaptation. I think Mr. Webber would be able to perform these functions if his pain were under control and he was having no side effects from the pain medications that he required.” *Id.* at 349. This letter is not particularly enlightening inasmuch as it begs the question of whether the plaintiff is in fact suffering side effects from the medications he requires. The plaintiff finally cites his own self-report as recorded by another DDS consultant, Adrienne J. Butler, Ed.D., concerning the side effects of his former medications. *See id.* at 359. This neither medically corroborates (continued on next page)

the administrative law judge must make a credibility finding regarding the claimed pain or other symptoms. *See, e.g.,* Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2003) ("SSR 96-7p"), at 137 ("The determination or decision must contain specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight."). On review, the supportability of this determination is assessed on the same basis as are credibility determinations in general – *i.e.*, "entitled to deference, especially when supported by specific findings." *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

In accordance with *Avery*, the administrative law judge closely questioned the plaintiff concerning his pain, his treatments for it and his activities. *See, e.g.,* Record at 37-54. He supportably determined from the plaintiff's demeanor at hearing and level of activity (which included service on a school board, occasional substitute-teaching at a local elementary school, driving, running errands, gardening and socializing) that although he suffered from some breakthrough pain, he retained sufficient attentiveness and responsiveness to undertake gainful employment. *See id.* at 18-19, 40-44, 70, 360.

D. *Inability To Drive Long Distances.* The plaintiff finally asserts that the administrative law judge erred in neglecting to factor in his inability to travel long distances in assessing whether the commissioner had met her burden of proving he was capable of performing jobs that exist in significant numbers in the regional economy. *See* Statement of Errors at 3. I perceive no error.

the existence of such side effects nor bears on his current medications.

At hearing, the plaintiff's attorney began to query the vocational expert as to whether "a limitation on distance someone can drive affect [sic] the ability to – it would affect the number of jobs that are available[.]" Record at 65. The administrative law judge interrupted, stating:

Let me intrude on that. The hypothetical situation for disability has a kind of an oddball twist to it. Whether or not he can drive to be there was immaterial. If you take him – the question is if you take him and levitate him to that area and place him in that job could he perform it[.]

Id. This statement was, in the main, accurate. As the First Circuit has observed:

Congress, tightening the definition of disability, eliminated consideration of travel difficulties when those difficulties were extrinsic to the claimed disability; the length and expense of commuting and the resulting inconveniences were no longer to influence a disability determination. A person, otherwise able to work, is in effect offered a choice: he can choose either to commute the distance to his job or he can move closer and avoid the expense and inconvenience. Disability insurance is not available to fund his decision to live far from available jobs.

Lopez Diaz v. Secretary of Health, Educ. & Welfare, 585 F.2d 1137, 1140 (1st Cir. 1978) (citations omitted). However, the First Circuit recognized a caveat:

When, however, the claimant asserts that his locomotive disabilities render it impossible, or extremely difficult, for him to physically move his body from home to work, the claim, it seems to us, is of a different nature. His "commuting problems" are no longer extrinsic to his disabilities; they are a direct consequence of them.

Id. In this case, the plaintiff's driving difficulties evidently are attributable to his knee impairment. *See, e.g.*, Record at 44 (plaintiff has to use his left foot for brake). Nonetheless, the plaintiff claims merely that he is incapable of driving long distances, *see* Statement of Errors at 3, not that it is impossible or extremely difficult for him to commute even locally to a job. In fact, he drives daily. *See, e.g.*, Record at 44 (plaintiff drives daily). His situation accordingly is materially distinguishable from that of the claimant in *Lopez Diaz*, who alleged that her condition rendered her unable to travel to and from work, *compare, e.g., Lopez Diaz*, 585 F.2d at 1137-38. As the administrative law judge suggested at hearing, inability to travel long distances

is irrelevant for purposes of assessing whether jobs exist in significant numbers to qualify a person as non-disabled at Step 5. *See, e.g., Harmon v. Apfel*, 168 F.3d 289, 293 (6th Cir. 1999) (“By her own admission plaintiff can and does drive her automobile to transport herself, at least to some extent. The travel factor that plaintiff contends is relevant to her disability determination is therefore an extrinsic factor – that is, the long distance she must travel to the nearest metropolitan area and not simply a physical problem.”); *Elliott v. Sullivan*, No. 89-1828, 1990 WL 52374, at **5 (6th Cir. Apr. 26, 1990) (“Although the first circuit has held that travel difficulties should be considered when the claimant’s locomotive disabilities render it impossible or extremely difficult to move his or her body from home to work, in the instant case no such showing has been made. Claimant conceded in a disability report and in her testimony that she performed household chores including cooking, dusting, shopping and laundry and that she drove short distances. These activities are inconsistent with a determination that claimant is not able to travel to and from work.”) (citation omitted).⁸

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum,

⁸ I discern no inconsistency between this line of caselaw and *Welch v. Barnhart*, No. 02-247-P-C, 2003 WL 22466165 (D. Me. Oct. 31, 2003) (rec. dec., *aff’d* Nov. 23, 2003), which counsel for the plaintiff cited at oral argument for the proposition that his difficulty driving should have been factored into analysis of whether jobs existed in significant numbers that he could perform. In *Welch* I concluded that “particularly in the absence of evidence showing that the plaintiff is unable to travel, . . . the existence of 350 or more jobs in the region and more than 50,000 nationally is sufficient to meet the ‘significant number’ requirement.” *Welch*, 2003 WL 22466165, at *4.

within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of April, 2004.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

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